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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., AND THE UNITED STATES,
Respondents.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Hoopa Valley Tribe's petition for a writ of certiorari to review the judgment of the United States Court of Claims in this case was denied by this Court on April 22, 1974. In support of this petition for rehearing, petitioner asserts that the filing of a petition for writs of certiorari in the companion cases of *Tonasket* v. *Thompson* and *Nicholson* v. *Laramie*, No. 73-1281, and this Court's Order of April 22, 1974, requesting the views of the United States in *Tonasket* and *Nicholson*, constitute "intervening circumstances of substantial or controlling effect" which call for this Court to reconsider its denial of the Hoopa Valley Tribe's petition for a writ of certiorari in this case.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. A petition for certiorari was timely filed on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATEMENT

In 1958, the Secretary of the Interior ruled that the members of the petitioner Hoopa Valley Tribe were the exclusive owners of that part of the Hoopa Valley Reservation known as the Square. 65 I.D. 59, 68 (1958). Respondents, 3,323 Indians of primarily Yurok extraction, filed suit in the Court of Claims attacking the 1958 decision of the Secretary, and claiming that the United States was liable for denying them their aliquot share of the revenues derived from the sale of timber situated on the tribal lands of the Square.[1] This timber revenue had been previously distributed by the Government exclusively to enrolled members of the Hoopa Valley Tribe, in accordance with the Secretary's prior ruling.

On May 22, 1972, the trial judge of the Court of Claims, rejecting the administrative decision of the Secretary, ruled that the 1891 Executive Order (1 Kappler 815), which had annexed the Addition to the Square, created a single indivisible reservation for the joint

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[1] The Yuroks did have their own reservation—the so-called "Addition"—but this reservation has been almost totally allotted to Yuroks and sold; thus, these plaintiffs have little of their reservation lands remaining. In effect, the Court of Claims' ruling in *Short* has combined the lands of both Indian tribes (Hoopa and Yurok). However, the Yuroks, having disposed of their tribal lands, are now in the position to share with the Hoopas, who kept their tribal lands intact, and thereby receive a double benefit from the property of the Hoopa Valley Reservation, to the detriment of the Hoopa Indians. *See* Petition in No. 73-1104 at 10-12.

benefit of all Indian residents (App. A at 11);[2] and that, consequently, plaintiffs were entitled to a pro rata share of the timber revenue derived from the Square. The trial judge further ruled that 22 of the 26 so-called "sample plaintiffs" were entitled to share as "Indians of the Hoopa Valley Reservation", and set aside the cases of the remaining four sample plaintiffs for retrial and further briefing. (App. A at 112). On October 17, 1973, the Court of Claims affirmed the conclusions and recommendations of the trial judge, *per curiam*, and "remanded to the trial judge for further proceedings." (App. A at 112).

The Hoopa Valley Tribe and the United States Government filed separate petitions for certiorari, seeking Supreme Court review of the Court of Claims decision.[3] In addition, 8 *amicus* briefs, representing more than 15 separate Indian tribes and national Indian organizations,[4] were filed in support of the petition of the Hoopa Valley Tribe. Nevertheless, on April 22, 1974, this Court denied the petitions for certiorari. Justices Douglas and Stewart would have granted certiorari. 42 U.S.L.W. 3595 (April 23, 1974).

Further proceedings before the trial judge of the Court of Claims are now scheduled for the purposes of (1) determining the standards of individual entitlement which may be used in resolving the outstanding claims of the remaining 3,301 plaintiffs for a pro-rata share of the tribal assets of the Hoopa Valley Reservation; (2) re-

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[2] The full text of the opinion below was included as Appendix A to the Hoopa Valley Tribe's petition for certiorari (*Hoopa Valley Tribe* v. *Short*, No. 73-1104). All references to the court's opinion will therefore appear as "App. A at ——."

[3] *Hoopa Valley Tribe* v. *Short*, No. 73-1104; *United States* v. *Short*, No. 73-1244.

[4] *Amicus* briefs were filed by the National Tribal Chairmen's Association and the National Congress of American Indians.

solving the factual disputes as to which of the remaining plaintiffs qualify under the eligibility standards to be established by the court; and (3) computing the amount of recovery for each plaintiff held to be an Indian of the Hoopa Valley Reservation.[5]

A primary question raised before the Court of Claims, and discussed in both petitions for certiorari, concerns the authority and jurisdiction of the Court of Claims to reject the actions of the Secretary of the Interior, with respect to determining individual Indian entitlement to tribal assets, and to substitute its own judgment for that of the Secretary. The Hoopa Valley Tribe urged that the Secretary of the Interior properly exercised his discretion in approving the constitution and bylaws of the Hoopa Valley Tribe, distributing per capita payments exclusively to members of that group, and ruling that plaintiffs had no interest in the Square. (Petition in No. 73-1104 at 15.) The United States urged that "[t]he decision of the Court of Claims unduly interferes with the authority of the political branches of the government to recognize tribal membership and tribal jurisdiction." (Petition in No. 73-1244 at 10-13.)

A materially identical question has been raised in the companion cases of *Tonasket* v. *Thompson* and *Nicholson* v. *Laramie*, No. 73-1281, wherein the governing body of the Confederated Tribes of the Colville Indian Reservation, Washington, pursuant to the provisions of its tribal constitution which had been previously approved by the

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[5] The proceedings before the trial judge promise to be protracted and complex. He has already identified certain issues which must be briefed before proper entitlement standards can be established (*i.e.*, degree of Indian blood; dual tribal status; the effect of birth off the reservation; and the effect of prolonged residence off the reservation). In addition, matters such as voluntary abandonment of tribal relations, the effect of having received termination benefits, among others, must be addressed in order to resolve the claims of the remaining plaintiffs.

authorized representative of the Secretary of the Interior, denied the applications of certain individuals for tribal enrollment.

On February 20, 1974, 37 days after the petition of the Hoopa Valley Tribe was filed herein, the Confederated Tribes of the Colville Reservation petitioned this Court to review the decisions of the Ninth Circuit in *Tonasket* and *Nicholson*,[6] which held that the federal district court had jurisdiction to consider these individual enrollment claims under the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301-03). On precisely the same day that this Court denied the petitions for certiorari of the Hoopa Valley Tribe and the Government in *Short*, *i.e.*, April 22, 1974, it requested the Solicitor General to present his view in the twin enrollment cases of *Tonasket* and *Nicholson*. 42 U.S.L.W. 3954-55 (April 23, 1974). Petitioner submits that the filing of the petition for certiorari in *Tonasket* and *Nicholson*, and this Court's subsequent request for the views of the United States, constitute intervening circumstances of substantial and controlling effect which warrant a rehearing, under Supreme Court Rule 58, of the Hoopa Valley Tribe's petition for certiorari, *cf. Forgett* v. *United States*, 390 U.S. 203 (1968), at least if certiorari is granted in *Tonasket* and *Nicholson*.

ARGUMENT

1. The cases of *Tonasket*, *Nicholson*, and *Short* involve the same threshold issue of federal jurisdiction, *i.e.*, whether the federal courts have jurisdiction, under the Indian Civil Rights Act, or otherwise, to determine questions of tribal membership. Plaintiffs in *Tonasket*

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[6] The Colville petition was filed 7 days after the government's petition for certiorari was filed in *United States* v. *Short*, No. 73-1244.

admittedly seek enrollment in the Colville Confederated Tribes in order to share tribal benefits. Although plaintiffs in *Short* are not seeking enrollment in the Hoopa Valley Tribe as such, it is unquestionably true, nevertheless, that they do seek to be included in the reservation tribal entity which is entitled to share in the communal assets of the Hoopa Valley Reservation. The Court of Claims has charged the trial judge with the task of preparing a reservation roll for the Hoopa Valley Reservation. This compilation will be used for the express purpose of determining individual substantive entitlement to the unallotted or tribal property of that reservation.

It is immaterial whether the trial judge will actually be determining membership in the Hoopa Valley Tribe,[7] the Yurok or Klamath River Tribe, or some new tribal entity which now occupies the extended Hoopa Valley Reservation. The essential fact is that he will be called upon to determine individual Indian entitlement to tribal property, *but cf. Cherokee Freedmen* v. *United States*, 195 Ct. Cl. 39 (1971), a determination that will be binding on the Secretary in his future stewardship of the reservation.

The authority to make such determinations has been expressly delegated by Congress to the Secretary of the

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[7] The Hoopa Valley Tribe is a federally recognized Indian tribe. The Yurok Indians are not so organized and have done little to maintain their tribal identity. Furthermore, it is as yet unclear what influence the new Yurok majority will have on the political, social and economic affairs of the Hoopa Valley Tribe, as a result of the Court of Claims consolidation. It is significant that since this Court's denial of certiorari on April 22, 1974, certain Yurok leaders have vigorously renewed their demands that the Bureau of Indian Affairs withdraw its recognition of the Hoopa Valley Tribe. Therefore, we may well regard the actions of the Court of Claims, in years to come, as the final determination of enrollment in the Hoopa Valley Tribe of Indians.

Interior, under 25 U.S.C. § 163,[8] and, in the case of the Hoopa Valley Reservation, the Secretary has previously exercised this discretion in a reasonable and prudent manner under the circumstances. *See Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); *cf. Slattery* v. *Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971). *See also* Petition of United States for a writ of certiorari in *United States* v. *Short*, No. 73-1244 at 10-13.

In summary then, the cases of *Short*, *Tonasket*, and *Nicholson* raise the following questions in common:

A. Whether the federal courts have jurisdiction, under any circumstances, to determine tribal enrollment, or whether such determinations are political in nature, and, therefore, exclusively within the province of the Tribe and the Congress?

B. Whether a federal court can substitute its judgment for that of the Secretary of the Interior in the exercise of his discretion under 25 U.S.C. § 163?

2. In addition to the unresolved questions of law common to *Short*, *Tonasket*, and *Nicholson*, it should be noted, as well, that the cases are factually related, and will inevitably follow a similar course in the wake of Supreme Court review on certiorari. For it is most significant that the critical factor raised as a bar to plaintiffs' enrollment in *Tonasket* and *Nicholson*, *i.e.*, membership in a

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[8] 25 U.S.C. § 163 provides in pertinent part:

> The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood . . . .

different Indian tribe,[9] has been identified by the trial judge as a subject for further briefing and retrial in *Short*.[10] Thus, assuming that this court denies certiorari in *Tonasket* and *Nicholson*, the federal district court will then be charged with determining the effect of dual tribal status on tribal enrollment, precisely the same question now before the trial judge in *Short*. Conversely, assuming that this court grants certiorari in *Tonasket* and *Nicholson* and ultimately rules that federal courts lack jurisdiction to determine tribal enrollment, we contend, in that case, that the enrollment proceedings now scheduled before the trial judge in *Short* would be in violation of that ruling.

CONCLUSION

Inasmuch as the cases of *Tonasket*, *Nicholson*, and *Short* raise materially identical questions, petitioner submits that if this Court is disposed to grant the petition for writs of certiorari in *Tonasket* and *Nicholson*, it should also grant the petition for a writ of certiorari in this case.[11]

Petitioner respectfully requests, therefore, that the Hoopa Valley Tribe's petition for certiorari be reheard by this Court in conjunction with the petition for cer-

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[9] The factual backgrounds in *Tonasket* and *Nicholson* are summarized in the petition of the Colville Confederated Tribes, *Tonasket* v. *Thompson*, No. 73-1281, at 4-10.

[10] App. A at 110.

[11] The Colville Confederated Tribes filed, on February 6, 1974, a statement *amici curiae* in support of the Hoopa Valley Tribe's petition for a writ of certiorari in *Short*. Leave to file such statement was granted by this Court on April 22, 1974. 42 U.S.L.W. 3595 (April 23, 1974). The Hoopa Valley Tribe has recently moved for leave to file a statement *amicus curiae* in support of the Colville Confederated Tribes' petition for writs of certiorari in *Tonasket* and *Nicholson*. Said statement was filed on April 4, 1974 and is presently pending before the Court.

tiorari now pending in *Tonasket* v. *Thompson*, No. 73-1281.[12]

Respectfully submitted,

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May, 1974

[12] It should be noted that petitioner has not requested the Court of Claims to stay its proceedings in *Short* pending Supreme Court action on this petition for rehearing.

CERTIFICATE OF COUNSEL

Comes now JERRY C. STRAUS, counsel for petitioner, Hoopa Valley Tribe, and respectfully certifies that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specifically set forth in Rule 58(2) of the Revised Rules of the Supreme Court of the United States.

JERRY C. STRAUS
Counsel for Petitioner

CERTIFICATE OF SERVICE

Petition for Rehearing on Denial of Petition for a Writ of Certiorari to the United States Court of Claims served this 16th day of May, 1974, by mailing three copies first class, postage pre-paid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, attorney for respondent United States, and air mail, postage pre-paid, to Harold C. Faulkner, Esq., and William C. Wunsch, Esq., c/o Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California 94104, attorneys for respondents Jessie Short, et al.

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